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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 971

SUSIE ANN GRAHAM, *Petitioner*

v.

THE PENNSYLVANIA RAILROAD

and

THE WASHINGTON TERMINAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Susie Ann Graham, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on December 10, 1964 and the denial of a rehearing en banc entered on February 5, 1965.

OPINIONS BELOW

The United States District Court for the District of Columbia wrote no opinion but entered its Order on March 20, 1964 (see pp. 14 and 15 of JA filed herein pursuant to rule 21). The Opinion of the United

States Court of Appeals for the District of Columbia Circuit is reproduced in Appendix A, infra, pp. A1 through A7 and its amended footnote Appendix A7. This opinion has as yet not been reported. The Judgment of the United States Court of Appeals for the District of Columbia Circuit is reproduced in Appendix B1. The denial of the petition for a rehearing en banc is reported in Appendix B2.

JURISDICTION

The judgment of the court below was entered on December 10, 1964 and the denial of the petition for a rehearing en banc was entered on February 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a civil action should have been dismissed by application of the amended Federal Rules of Civil Procedure effective July 1, 1963. An application of the prior rules to the action pending when the amendments took effect would not have had such a result. The Plaintiff's lawsuit was *pending for three and one-half years prior to July 1, 1963.* The Plaintiff passed away prior to July 1, 1963 and a motion to substitute his personal representative was made well within the *two year period of death* as required by the Federal Rules of Civil Procedure in existence at the time his action was commenced and on the date of his death. The substitution occurred after the ninety day period set forth in the July 1, 1963 amendments to Rule 25(a)(1) the Plaintiff, by counsel, having filed a suggestion of death as a normal procedure in the local jurisdiction to abate a scheduled pre-trial proceeding and unknow-

ingly triggering the shortened time under the newly amended Federal Rules.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 25(a)(1) prior to the July 1, 1963 amendments is set forth in Appendix C1, infra. Rule 25(a)(1) subsequent to July 1, 1963 is set forth in Appendix C1, infra. Rule 86 and 86(e) are set forth in Appendix C2, infra.

STATEMENT

Petitioner's decedent, David Graham, filed a personal injury action against The Pennsylvania Railroad and The Washington Terminal Company on December 9, 1959 (JA 4, 5) alleging that on January 16, 1959, David Graham suffered injuries when he slipped on accumulated ice on the steps of a train operated by The Pennsylvania Railroad as he alighted at the Union Station in Washington, D. C. The Union Station is operated by The Washington Terminal Company. After discovery proceedings were completed the cause was Certified to the Ready Calendar in April, 1962 (see docket entries JA 3). This Certification is a procedure under the local rules of the United States District Court for the District of Columbia necessary before an action may progress to the stage of the pretrial proceeding.

The cause was finally set for pre-trial on July 23, 1963. At this time David Graham's then local counsel were advised by his counsel in another city that he had on May 17, 1963 passed away. A Suggestion of Death of the Plaintiff, David Graham, was filed (JA 9), counsel moving the court below to abate the action until the proper personal representative of the decedent could be substituted (See J. Wright's dissenting opin-

ion Appendix A5, infra). Plaintiff's counsel then had the District Court strike the cause from the Ready Calendar since the death of the Plaintiff prohibited the cause from being ready for pre-trial. (See J. Wright's dissenting opinion Appendix A5-A6, infra).

On February 3, 1964, a period of less than nine months from the death of David Graham, a motion to substitute his personal representative was filed (JA 9, 10). This motion was opposed by the defendants who at the same time filed a motion to dismiss (JA 10, 11, 12) on the basis that under amended Federal Rule 25(a)(1) which had become effective on July 1, 1963, a period of forty-four days after the death of the plaintiff, such substitution was required to be made within ninety days after death is suggested on the record. Rule 25(a)(1) prior to amendment had allowed a period of two years.

The District Court denied the motion to substitute and granted the defendant's motion to dismiss (JA 14, 15). An appeal to the United States Court of Appeals for the District of Columbia Circuit resulted in an affirmance of the District Court, Wright, J., dissenting. A timely petition for a rehearing en banc was denied by a vote of six to two, Fahy, J. joining Wright, J. This Petition has followed.

REASONS FOR GRANTING THE WRIT

Petitioner here seeks to have corrected the decisions of the courts below which have hardened into precedent and left a result which is a fundamental misapplication of the Federal Rules of Civil Procedure as promulgated by this Court. In all of the amendments to the Federal Rules since their first enactment, and indeed even at that time, Rule 86 has provided a safety-

valve constituting a square of justice through which the circle of injustice should not escape. To some cases the amended rules were to apply; to others, not. See: *Ramsey, et al.* v. *Curtis*, 18[illegible] F. 2d 687 and *New Orleans PublicBelt R. Co.* v. *Wallace*, 173 F. 2d 145. The 1963 amended Rule 86, now 86(e), simply and clearly stated, provides that a litigant whose action is pending when the amended Federal Rules of Civil Procedure take effect shall *not* have those rules applied to his cause of action if they would not be feasible or an *injustice* would result. Instead, the Rules in effect at the time his action began *are* to control.

If the Federal Rules of Civil Procedure operative at the time the decedent began his cause of action and also at the time of his death had been applied by the courts below, the substitution of his Administratrix would have been allowed. *Such attempted substitution was made fifteen months before the time limit of Rule 25(a)(1) in effect at those times.* If the July 1, 1963 amendments were applied, the substitution was three and one-half months too late.

The INJUSTICE in the present case is simply stated. As a result of the misapplication of the July 1, 1963 amendments to the Federal Rules of Civil Procedure a litigant's cause of action has been finally dismissed. Such dismissal, after a court-congested wait of three and one-half years for a notice of pre-trial, has come before a disposition of the cause of action upon its merits. A proper application and a clearly-merited interpretation by the courts below of Rule 86(e) would not have abruptly terminated this litigation.

This Court has recently indicated a preference for disposition of litigation on the merits of the cause:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Proced-

> ure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 2 L. ed. 80, 86, 78 S. Ct. 99. The rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." *Foman* v. *Davis,* 371 U.S. 178, 9 L. ed. 222, 225, 226, 83 S. Ct. 227 (1962).

Petitioner cannot state more clearly its case than the dissenting opinion below has done in capturing the spirit of the Federal Rules. It is irony, in its cruelest form, that the amended Federal Rules of Civil Procedure are in this cause being misinterpreted to foment the very injustice they were designed to prevent.

CONCLUSION

Petitioner asks this Court to restore the fire in the beacon light of safety which the courts below have snuffed out. Petitioner respectfully prays this Court to grant certiorari in this case.

Respectfully submitted,

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